STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

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RULEMAKING TO MODIFY RULES	)	Docket 02-SIT-1
OF PRACTICE AND PROCEDURE FOR	)	
POWER PLANT APPLICATIONS	)	
	)	

COMMENTS OF MIRANT CORPORATION
RE: SITING COMMITTEE CONSIDERATION OF POSSIBLE AMENDMENTS TO THE REGULATIONS

Mirant Corporation ("Mirant") submits the following comments in response to the California Energy Commission's ("CEC") proposed amendments to California Code of Regulations ("CCR"), Title 20, § 1720.3 regarding construction deadlines. Mirant supports the CEC's desire to be fully informed of the status of construction of approved projects and has, in fact, voluntarily kept the CEC fully informed regarding the status of the Contra Costa project. Mirant, however, does not and can not support the proposed amendments.

As set forth below, the proposed amendments do not take into account the regulatory and economic environment confronting power plant developers in the state of California. If approved and adopted by the CEC, the proposed amendments will remove necessary regulatory flexibility and serve as a disincentive for the development of new, efficient and clean generation. Moreover, the CEC has not provided any basis for the proposed amendments or any coherent policy objective to be achieved by their passage.

Regardless, the proposed amendments would be void and unlawful if adopted by the CEC.

I. 20 CCR § 1720.3 DOES NOT NEED TO BE MODIFIED OR AMENDED IN ANY MANNER

The current process employed by the CEC for the certification of a power plant site requires significant time and capital expenditures to obtain a final decision. Obtaining a final decision can take several years and require the expenditure of several million dollars.

The cost and time expended in preparing and obtaining approval of a proposed project is not recoverable. As such, Mirant would not undertake such a large financial and time consuming commitment if it did not intend to build any proposed project for which an application for certification is filed with the CEC.

The flexibility afforded by 20 CCR § 1720.3 is an important regulatory provision that is relied upon when deciding whether to pursue certification of a proposed project. In particular, flexibility regarding construction is necessary because there are several matters that must be resolved after obtaining the final decision before construction can commence. The most important of which is securing project financing. Financing of a project does not occur until after the final decision is obtained and the time period for administrative and judicial appeals has lapsed. At that time, the decision is final and the conditions of certification for the construction of the project are known and not subject to change, except to the extent the project is modified requiring amendments to the final decision. It is only at this time that financial institutions are capable of determining the credit risks associated with a project and making final decisions regarding the extension of a credit facility to allow construction to proceed.

Obtaining financing can require significant periods of time. Judicial and administrative appeals can proceed for several months and even possibly years. Thereafter, the financing process can take several months. As currently written, 20 CCR § 1720.3 provides sufficient time for the judicial and administrative appeals to run and obtain financing without having to seek extensions or modifications to the final decision from the CEC. More importantly, the current regulation provides a level of certainty and stability regarding the validity of the certificate for a defined period of time, which provides a level of comfort necessary to obtain financing.

The flexibility afforded by 20 CCR § 1720.3 also allows for the resolution of other issues that may arise after the final decision is obtained. For example, when construction activity is booming in other industries, qualified EPCs, general contractors and personnel in the specialty trades may be scarce. This may result in delays in commencing construction, extended construction schedules and/or require the payment of significant premiums. The current regulations provide the developer with sufficient flexibility to resolve such matters in a cost effective and efficient manner that are within the project's fiscal restraints, which benefit the ratepayers of the state by reducing the cost of development.

The need for flexibility has been made even more necessary by the recent events involving the fall out from deregulation under AB 1890. The primary issue facing the CEC is how the siting process fits into the post-AB 1890 era of electricity regulation. The number of unsettled policy issues prompted the chairman of the California Independent System Operator to recently state that there are too many issues to be

resolved before California can redesign its electricity market.[1] The regulatory uncertainties facing California also increase the uncertainty in the financial markets resulting in difficulties in obtaining project financing and increasing its cost due to increased credit risks.

At this point in time, it is unclear how the regulatory and financial uncertainties will be resolved. It is nonetheless clear that the flexibility provided by 20 CCR § 1720.3 is needed in order to encourage the development of new projects. If the proposed amendments are adopted, it is unclear if new projects will continued to be proposed. Mirant submits that 20 CCR § 1720.3 should not be amended until statutory and regulatory stability is achieved and it is clear how the siting process fits within the post-AB 1890 regulatory scheme. If the amendments are adopted, Mirant submits that they should only be applicable to projects filed with the commission after the effective date of the proposed amendments on grounds that it is inequitable to change the regulatory scheme after an application for certification is filed. It should be noted, that the projects currently before the commission were filed at the height of the regulatory crisis and those who filed them should be rewarded for taking action, not penalized.

II. THE PROPOSED AMENDMENTS PROVIDE NO FLEXIBILITY AND WILL BE A DISINCENTIVE FOR THE DEVELOPMENT OF NEW GENERATION AND EXCEED THE STATUTORY GRANT OF THE WARREN ALQUIST ACT

A. The Proposed Deadlines for Installation of the Concrete Foundations.

The proposed regulations would require that the "installation of concrete foundations for major project structures" be completed within two years after the

[1] *Reuters*, April 26, 2002.

effective date of the decision.[2] This proposed time limit does not take into account possible delays caused by administrative and legal appeals, project financing, and construction issues.

1. Construction Issues.

The proposed deadline does not allow for or take into account issues associated with brownfield development. Brownfield development benefits all Californians by providing a means for existing industrial property to continue to be utilized in an economic and responsible manner. However, brownfield development is more expensive due to site conditions that may require significant demolition of existing structures, environmental remediation, and other regulatory and construction tasks that must be completed prior to the commencement of construction of a new project. Thus, projects that involve repowering, modernization and expansions at existing power plant facilities involve increased expense and will require more time in order to fully construct.

Repowering, modernization and expansion projects also have the added benefit of providing the means of retiring and replacing antiquated generation assets. Modern generation facilities provide a more efficient, cleaner and flexible source of generation compared to 1950's and 1960's steam boilers, which they typically replace. Despite these advantages, there is no policy or incentive for repowering and modernization projects. In fact, the proposed amendments would serve as a deterrent for such projects since the risk of being unable to meet deadlines is too great. Accordingly, the proposed amendments should exempt all repowering, modernization and expansion projects.

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[2] It is assumed that concrete foundations for major project structures is intended to refer to the foundations for the combustion turbines, HRSG's and steam turbines. To avoid any possible confusion and for the sake of clarity, a definition should be provided.

2. Administrative and Legal Appeals.

The effective date of a decision is the date it is filed with the Docket Unit, unless otherwise specified in the final decision. 20 CCR § 1720.4. However, the CEC's final decision is not truly final due to the possibility of both administrative and judicial challenges. *See* Public Resources Code §§ 25530, 25531. Additionally, other aspects of the final decision are subject to challenge through administrative and judicial appeals with respect to actions of other state and federal agencies such as challenges to an air or NPDES permit.

Administrative and judicial appeals brought after the final decision becomes effective will necessarily cause delays in construction of the project. In some circumstances, the delays could be significant. These additional proceedings may result in the modification to the conditions imposed by the CEC in its final decision, which may in turn require design and engineering changes.

The filing of an appeal and the time in which the appeal is resolved is not within the exclusive control of a developer. In some circumstances, the appeal process can last several months to several years. To avoid this from being a problem, the proposed amendments should be modified to provide for an automatic tolling of the deadline during any administrative or judicial appeal or challenge to the final decision or any other state or federal agency decision that affects the ability to construct the project.

3. Project Financing.

Project financing is not finalized until after the final decision from the CEC is obtained and the time for administrative and judicial appeals has expired. Financial institutions will not extend a credit facility for the construction of a project until all of the

requirements regarding its construction are known. In other words, the conditions of certification must be obtained and analyzed by the proposed lender before any credit facility can be extended or obtained. The review process can and usually does take a significant period of time. The proposed deadline does not take into account time necessary to obtain financing and the impact it can have on the start of construction.

B. Assessment of LORS Compliance and Impacts at Time of Request for Extension.

The only flexibility provided by the proposed amendments is the provision allowing for an extension up to one year. The extension, however, is discretionary and requires a showing by the project owner that the project is in compliance with all LORS at the time the request is made. Further, the project owner is required to make a showing that the project will not have any significant impacts not foreseen at the time of the initial proceeding.

1. Good Cause is Not Defined.

The proposed amendments do not define good cause. Good cause is an amorphous standard and is capable of being applied inequitably and inconsistently. For example, is a delay in obtaining project financing going to be considered good cause? Are delays associated with site conditions such as the need for the demolition of existing facilities going to be considered good cause? Are market conditions that make a project temporarily uneconomical going to be considered good cause? What factual showing will the project owner be required to make in order to establish good cause?

In order to provide some certainty and stability, the proposed amendments should provide some safe harbors that will provide for an automatic extension. At a minimum, automatic extensions should be provided for any administrative and/or judicial appeals,

site conditions that require significant work before construction of the new project and the time necessary to obtain project financing. Additionally, factors should be identified that will be utilized in determining when good cause exists.

2. Compliance with LORS at the Time the Request for Extension is Made.

The requirement that the project owner establish LORS compliance at the time the request for extension is made is vague. The purpose of the certification process is to determine and assure that the development and construction of a proposed project complies with all applicable LORS. In fact, the CEC's final decision is required to make a finding with respect to LORS compliance. Public Resources Code § 25525. Thus, the only requirement for an extension should be whether the project is in compliance with the CEC's final decision. As discussed below, any attempt to reevaluate the project after the CEC issues its final decision and the time for administrative reconsideration has lapsed exceeds its statutory grant of authority thereby making the proposed regulations unlawful and void.

3. Assessment of Project Impacts at Time Request for Extension is Made.

The proposed requirement of evaluating the project at the time the request for an extension is made for issues not foreseen during the initial proceeding is not supported by any provision under the Warren Alquist Act and thus, the proposed amendments would be unlawful if they are adopted. The standard of review for regulations is contained in Government Code § 11342.2 which provides:

> Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the

statute. [Emphasis added.]

The courts interpreting Government Code § 11342.2 have held that an agency has no discretion to promulgate a regulation that is inconsistent with the governing statute. *Morris v. Williams* (1967) 67 Cal.2d 733; *Pulaski v. California Occupational Safety and Health Standards Board* (1999) 75 Cal.App.4th 1315. In reviewing the legality of an agency regulation, the standard for judicial review is whether the regulation is within the authority conferred, and is reasonably necessary to effectuate the purpose of the statute. *Id*. Administrative regulations that alter or amend the statute under which they have been adopted, or enlarge or impair its scope, are void, and it is the obligation of the court to strike down such regulations. *Id.*; *Helene Curtis, Inc. v. Assessment Appeals Board* (1999) 76 Cal.App.4th 124.

In order to obtain an extension, the proposed amendments would require the project owner to evaluate impacts of the project "not foreseen" during the initial licensing proceeding. The proposed amendments also provide the CEC with the authority to amend the final decision to mitigate any such impacts. The Warren Alquist Act, however, provides limited authority for reevaluation of the project and does not provide any authority for the powers sought to be conferred by the proposed regulations.

The statutory authority for reconsidering a final decision is set forth in Public Resources Code § 25530, which provides that a decision may be reconsidered by a motion of the commission or by petition of any party. The commission must bring its motion within thirty (30) days of adopting the decision. A party must bring a motion within thirty (30) days after the commission adopts the order. If a motion for reconsideration is not brought within the prescribed time frames, the CEC cannot order reconsideration of the decision.

The proposed amendments would have the effect of enlarging the CEC's authority to reevaluate a project after the final decision is adopted in a manner that is not authorized by any statute under the Warren Alquist Act. This ability to reevaluate an approved project is in direct conflict with Public Resources Code § 25530 which specifically prohibits the CEC from reconsidering a decision unless the motion to reconsider is made within thirty (30) days of the adoption of the order. Accordingly, the proposed amendments would be unlawful if approved and adopted.

C. Commercial Operation Must Commence Within Two Years of Installation of Concrete Foundations.

The proposed amendments would require that a project achieve commercial operation within two years after the concrete foundations are installed. This proposed deadline suffers from many of the same deficiencies as set forth above with respect to the deadline for installation of the concrete foundations.

1. Good Cause is Not Defined.

The proposed amendments provide no guidance on what will constitute good cause. For example, it is unclear if delays associated with scarce equipment and materials and/or skilled labor, or equipment failures during commissioning would constitute good cause. For purposes of providing certainty and clarification, the language should at a minimum be revised to define good cause and provide safe harbors entitling a project owner to automatic extensions if the conditions of the safe harbor are met.

2. Construction Issues Are Not Considered.

Delays can arise during the construction process that are beyond the control of a developer. Engineering modifications, procurement delays, shortage of skilled specialty laborers, weather, natural disasters, war, riots, etc. may cause significant delays but does

not automatically qualify for an extension under the proposed amendments. As stated above, the proposed amendments should set forth circumstances that will automatically qualify for an automatic extension.

D. Statutory Authority to Revoke Certification.

Public Resources Code § 25534 provides the CEC with limited authority to revoke the certification for an approved project. The CEC's authority is limited to revoking a certificate for false statements made by the applicant in any proceeding, failure to comply with the conditions of certification or for a violation of the Warren Alquist Act or regulation promulgated thereunder. The statute provides no other basis for the revocation of a certificate. Further, the Warren Alquist Act contains no provision that sets forth any construction deadlines or milestones. Thus, the proposed amendments are attempting to expand the authority of the CEC under Public Resources Code § 25534 making the proposed amendments void and unenforceable.

III. CONCLUSION.

For the reasons stated above, Mirant cannot and does not support the proposed amendments to 20 CCR § 1720.3. Focusing on discrete issues such as construction timelines and other such issues may not be the optimal means to consider the primary issue facing the CEC, which is how the siting process will fit into the overall scheme of electricity regulation in the post-AB 1890 era.

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